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Jason R. Riley

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The Community Patent, or: How I Learned to Stop Worrying and Love the English Language*

Jason R. Riley†

I. THE CREATION OF A GENUINE EUROPEAN RIGHT¹

The question on the minds of inventors for almost thirty years has been how to implement a single European patent that can be defended in a single European court. After nearly three decades of attempts, however, Europe has been left with no Community patent. The European Patent Convention (“EPC”) came into effect in 1977 with the hopes of harmonizing Europe’s patent system.² Briefly, the EPC established a single procedure and office (the European Patent Office or “EPO”) for the grant of a European patent. A European patent is like a soap bubble—it is wonderful to look at, but the moment you touch it, it splashes into little pieces.³ A “European patent” ceases to exist upon grant. It becomes a “bundle” of national patents and is subject to the patent laws and litigation procedures of each member state. Validity is conditioned upon the European patent being translated into the language of each member state where the patent is to have effect.⁴ The extremely high translation costs alone

* The light-hearted title is based on the Stanley Kubrick film, *DR. STRANGELOVE, OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB* (Columbia Pictures 1964).

† Jason R. Riley is a 2002 J.D. Candidate at the Santa Clara University School of Law. He received a B.S. in Chemistry and a B.S. in Biochemistry from the University of Minnesota in 1997. Jason would like to thank Mark A. Kupanoff, Derek R. Owens, Maria S. Quintero, Alex Rudd, Michael J. Smith, and Wakako Uritani for their assistance with editing, making helpful suggestions, and in locating relevant sources. Jason can be contacted via e-mail at jriley_@go.com.

1. See *Promoting Innovation Through Patents, Green Paper on the Community Patent and the Patent System in Europe*, European Commission, at http://europa.eu.int/comm/internal_market/en/indprop/patent/paten.pdf (June 25, 1997) [hereinafter *Green Paper*].

2. Convention on the Grant of European Patents (European Patent Convention), Oct. 5, 1973, pmbl. (European Patent Office Publishing, 10th ed. 2000) [hereinafter EPC], available at <http://www.european-patent-office.org/legal/epc/e/ma1.html> (last updated Mar. 6, 2002).

3. *A View from Amsterdam*, LAWYER, Aug. 6, 2001, available at 2001 WL 11472860.

4. EPC, *supra* note 2, art. 137(2)(b) (“Any central industrial property office to which the application is transmitted may require that the applicant shall, within not less than two

can add up to more than the expense of prosecuting the entire patent in either the U.S. or Japan.⁵

A. *The Community Patent*

While many would consider the EPO a success, there are still those for whom the system is arcane and in need of reform.⁶ Large companies—for whom the cost of translation is merely the price of doing business in Europe, one they are more than willing to pay—favor the EPO. The real problem arises for small and medium-sized enterprises (“SMEs”), for which the cost of translation into several languages and the possibility of litigation on more than one frontier is prohibitively expensive.⁷

A solution exists that will be agreeable to applicants of all sizes: the Community patent. The Luxembourg Convention of 1975⁸ sought to establish a system of patents to facilitate the protection of European technological advances by enabling rights to be managed centrally, thereby affording greater transparency for competitors.⁹ Whereas the European patent becomes a tangled web of national patents, a Community patent would extricate the applicant from this snare since it would be a genuine *European* right. The *raison d'être* of enacting the EPC, after all, was to “strengthen cooperation between the States in Europe with respect to the protection of their inventions.”¹⁰ The Community patent would act much like a U.S. patent, given that it would be a unitary title for the European continent. Unfortunately, the Luxembourg Convention is not ratified, and its future is still uncertain. Despite attempts to create a Community patent and a “deadline” for its implementation,¹¹ national hubris of the member

months . . . file a translation on one of the official languages of the State in question of the original text of the European patent application . . .”).

5. Jean Eaglesham, *The Politics of Plagiarism*, FIN. TIMES, Nov. 17, 2000, at 16.

6. *Id.*

7. One might argue that the jagged pills of translation followed by a bitter chaser of litigation would become a common method of suicide among SMEs. See European Union Parliamentary Questions, 1998 O.J. (C 402) 87 (written question No E-1177/98 by Ulf Holm to the commission (Apr. 29, 1998) answer given by Mr. Monti on behalf of the Commission (June 11, 1998)).

8. See Agreement Relating to Community Patents—Done at Luxembourg on 15 Dec. 1989, 1989 O.J. (L 401) 1.

9. *Green Paper*, *supra* note 1, at 1.

10. EPC, *supra* note 2, pmbl.

11. Steps were taken at the 2001 Lisbon Summit making the adoption of the Community patent a top priority to be delivered by the end of 2001. The deadline, however, has come and gone without the adoption of a Community patent. See Press Release, UNICE, UNICE Urges Member States to Adopt a More Constructive Attitude Towards the Creation of a Community

states has resulted in even more of a rift than in the harmonization originally envisioned.

While the United States may be quick to criticize the lack of a unified Community patent,¹² there are many who feel the progress made in establishing the EPO is itself a great triumph.¹³ When compared with the pre-1977 patent system, it is. Nevertheless, when the European system is compared with that of either the United States or Japan, it takes a creative argument to reach the same conclusion.¹⁴ The Community patent, however, would bring Europe's patent system up to speed with the rest of the world. How would the Community patent accomplish this? What are its advantages?

II. CUTTING COSTS BY ELIMINATING TRANSLATIONS.¹⁵

The idea of a single language of patents is not a new one; it was originally proposed that English be the official language of the EPO. Although Germany seemed to have no quarrel, France was outraged.¹⁶ When France would not accede without the use of French as a co-language, Germany would no longer acquiesce. There are, after all, nearly 100 million German speakers and only 60 million

Patent (Mar. 29, 2001), available at [http://www.unice.org/C125679E00338D8B/AllDocumentsSearchEng/0885D1A51A5BEBC2C1256A1F00323EB7/\\$File/01-03-29Com-patent.pdf](http://www.unice.org/C125679E00338D8B/AllDocumentsSearchEng/0885D1A51A5BEBC2C1256A1F00323EB7/$File/01-03-29Com-patent.pdf).

12. See Franklin Pierce Law Center's Fifth Biennial Patent System Major Problems Conference, 36 IDEA 345, 347, 376-77 (1996) [hereinafter *Franklin Pierce*].

13. Jan Willems, *The EPC: The Emperor's Phantom Clothes? A Blueprint Instead of a Green Paper*, 1998 Intell. Prop. Q. 1, 1-16 (1998).

14. *Id.* at 2.

15. Translations are required upon "request" by article 65 of the EPC. EPC, *supra* note 2, art. 65. See Clifford Lees, *Translations: The Key Solution*, 10 EUR. INTELL. PROP. REV. 594 (1997).

16. Perhaps this outrage is justified. The French language has a glorious history in philosophy, literature, and song. From Molière to Serge Gainsbourg, French has long been the language of European culture. Remember that the *lingua franca* was once the language of diplomacy. Following the first world war, however, French President Georges Clemenceau allowed the treaty of Versailles to be written in both French and English as an homage to his British and American allies. This first surrender can be regarded as the beginning of the end. Now ninety percent of United Nations documents are in English. Ben Wild, *Sacre Bleu The Language of Love Hits the Sidewalk*, SYDNEY MORNING HERALD, Oct. 23, 2001, at 3, available at 2001 WL 27861308. This English invasion has worried the French so greatly that in 2000, the Commission de Terminologie published *En vrai Français dans le Texte*—a definitive list of 8,000 Anglicisms some want replaced in all official documents with Gallicisms of their own coinage (for example *la fin de semaine* for *le weekend* and *les bandes-designer* for *les comic-strips*). See ALFRED GILDER, COMMISSION DE TERMINOLOGIE, EN VRAI FRANÇAIS DANS LE TEXTE (2000); Lyn Shepard, *Politics of Language*, SWISS NEWS, Feb. 1, 2001, at 44, available at 2001 WL 17841783; *Insider: English marches forward*, BANGKOK POST, Mar. 27, 2001, available at 2001 WL 17376872.

francophones. In the end, the EPO decided upon three official languages.¹⁷

In practice then, a patentee must file an application in one of the three official languages.¹⁸ However, if an applicant uses a language other than the official three, that person may file in the official language of his respective state, but must nevertheless file a timely translation of the patent in an official language of the EPO.¹⁹ For example, an Italian inventor may file an application in Italian, but must subsequently provide a translation in English, French, or German. As aforementioned, the inventor must also designate the other countries in which he wishes to gain coverage.²⁰ To gain coverage in each of the designated states, however, the applicant must file a translation of the entire patent in the official language of each contracting state chosen.²¹ The alternative—to eliminate the translation requirement altogether—has unfortunately been repeatedly attacked as too “radical.”²²

Many Europeans fail to realize that the use of a single language is not a Machiavellian scheme to rebuild the Tower of Babel, but rather an attempt to simplify Europe’s overly elaborate system of ropes and pulleys that one must manipulate to gain patent coverage over the continent. Europe desires a unitary patent right, but is unwilling to consent to a unitary patent language. Why is there such reluctance?

17. EPC, *supra* note 2, art. 14(1) (“The official languages of the EPO shall be English, French and German.”).

18. *Id.* (“European patent applications must be filed in one of these languages.”).

19. EPC, *supra* note 2, art. 14(2).

However, natural or legal persons having their residence or principle place of business within the territory of a Contracting State having a language other than English, French or German as an official language, and nationals of that State who are resident abroad, may file European patent applications in an official language of the state. Nevertheless, a translation in one of the official languages of the European Patent Office must be filed within the time limit prescribed in the Implementing Regulations; throughout the proceeding before the European Patent Office, such translation may be brought into conformity with the original text of the application.

Id.

20. *Id.*

21. EPC, *supra* note 2, art. 137(2)(b).

22. Jerome Spaargaren, *A Conventional Way to Reduce Costs in the European Patent System*, 20 EUR. INTELL. PROP. REV. 289 (1998); *ESC Adopts Opinion on the Community Patent (European Union’s Economic and Social Committee)*, EUR. REP., Apr. 7, 2001, at 499, available at 2001 WL 26060218. See also Keijo Heinonen, *Translations of European Patents: Package Solution not the Answer*, 19 EUR. INTELL. PROP. REV. 220 (1997).

As Jonathan Faull, spokesman for the European Commission, said, "life is also about culture and cultural diversity and respect for people's interests."²³ Yet a patent does not embody culture; Europeans will not lose their national identities or rich traditions if they agree to practice patent law in English. English is already being taught to nearly ninety percent of all high school students in the European Union (EU).²⁴ It is the common language used in any technical field and the language used by most patent experts.²⁵

Translations are responsible for the lion's share of the expense when applying for a European patent. For example, a typical patent, enforceable in eight European countries, costs \$43,000—almost five times the cost of an equivalent U.S. patent and three times the cost of a Japanese patent.²⁶ The cost of translation into all eleven official EU languages, approximately \$15,000, is itself more expensive than either a U.S. or Japanese patent. Using only English, Europe could save hundreds of millions of dollars per year by eliminating translations no one will ever read.²⁷ Even a compromise of translating into the three official languages would shave \$13,000 off of the cost. Can this be achieved without offending half the continent?

In July 2001, gigantic strides were made towards decreasing translation costs.²⁸ Ten members of the EPC signed an agreement limiting the translation requirements for European patents.²⁹ Each

23. Ian Black, *Euro Patent Fails to Break Language Barrier*, GUARDIAN (London), Nov. 29, 2001, at P28, available at 2001 WL 31387049.

24. Willems, *supra* note 13, at 15.

25. Franklin Pierce, *supra* note 12. See also UNICE Position Paper on the Green Paper on the Community Patent and the Patent System in Europe [COM(97) 314 Final], in INTELLECTUAL PROPERTY RIGHTS: COMPENDIUM OF UNICE POSITION PAPERS 7, 8 (1997) [hereinafter *Position Paper*], [http://www.unice.org/unice/docum.nsf/all+by+description/041A4F216C32AFA6C12568B0004A76D3/\\$File/lpr-doc.pdf](http://www.unice.org/unice/docum.nsf/all+by+description/041A4F216C32AFA6C12568B0004A76D3/$File/lpr-doc.pdf).

26. Eaglesham, *supra* note 5.

27. For example, at the Institut National de la Propriete Industrielle, the French national institute of industrial property rights, translations are only consulted in two percent of cases. European Union Preparatory Acts, Proposal for a Council Regulation on the Community Patent, 2000 O.J. (C 337E) 278, § 2.4.4. ¶ 3; Franklin Pierce, *supra* note 12, at 376.

28. See Agreement on the application of Article 65 of the Convention on the Grant of European Patents (Oct. 17, 2000) (English version at 8), available at <http://www.ige.ch/E/jurinfo/pdf/j14106.pdf>.

29. *Id.* art. 1 (dispensing with translation requirements); Press Release, UNICE, European Patent: UNICE Welcomes Radical Cut in Translation Costs (Jul. 5, 2001) [hereinafter *Translation Costs*], at [http://www.unice.org/C125679E00338D8B/AllDocumentsSearchEng/68D2BC285C1DE3DAC1256A8100562E00/\\$File/01-07-05Patent-en.pdf](http://www.unice.org/C125679E00338D8B/AllDocumentsSearchEng/68D2BC285C1DE3DAC1256A8100562E00/$File/01-07-05Patent-en.pdf). The ten signatories to the Agreement, *supra*

party agreed that a patent granted by the EPO in one of the three official languages takes effect in its territory without the requirement of translation into its national language.³⁰ Although this agreement is a milestone in the reform of the European patent system and demonstrates a willingness to contribute to an environment supportive of innovation, it still falls short of the unitary character that a Community patent requires. Moreover, to enter into force over the continent, the patent must still be translated into Italian, Spanish, Portuguese, Greek, and Finnish.³¹

The Union of Industrial and Employers' Confederations of Europe (UNICE),³² the official voice of European Business, has condemned the high cost of translations and would only support the Community patent if it were comparable in cost to a U.S. patent.³³ UNICE points out that translation costs will only increase as the EU allows more member states to join.³⁴ The only way to achieve this goal, seemingly, would be to implement the Community patent without the slough of translations that weigh down the boots of the EPO. In an attempt to reach a mutual concession, the European Commission³⁵ has proposed a system where a Community patent need only be published in one of the three official languages of the EPO. This plan would cut translation costs down to about \$2,000.³⁶

note 28, are Germany, France, Denmark, Liechtenstein, Monaco, The Netherlands, Sweden, The United Kingdom, Switzerland and Luxembourg. *See generally id.*

30. *Translation Costs*, *supra* note 29.

31. Black, *supra* note 23. The Greek, Spanish, Italian, Portuguese, and Finnish delegations have insisted that all official languages should be used and be placed on the same footing. *See also Community Patent: Council Negotiations on Community Patent Making Slow Progress*, EUR. REP., May 16, 2001, at 483, available at 2001 WL 26060959.

32. UNICE is the official voice *vis-à-vis* the institutions of the European Union of the more than 16 million small, medium, and large companies active in Europe today. These companies employ more than 106 million people. They generate the resources that are the basis for the well-being and living standards of society. Employment in Europe depends largely upon their success. Created in 1958, UNICE's membership now consists of 34 central industrial and employers' federations from twenty-seven European countries working together to achieve growth and competitiveness in Europe. Its primary mission is to ensure that common interests of the companies it represents are heard, understood, and taken into account. UNICE is a social partner, and is enshrined in the Treaty Establishing the European Community. More information is available on UNICE from its Web site at <http://www.unice.org/> (last visited Apr. 24, 2002).

33. *See Position Paper*, *supra* note 25, at 8.

34. *Id.*

35. The Commission initiates Community policy and represents the general interests of the European Union. More information on the role of the European Commission is available, in all eleven official languages, on its Web site, <http://europa.eu.int/comm/> (last visited Mar. 24, 2002).

36. Eaglesham, *supra* note 5.

UNICE had originally met this suggestion with aversion, favoring instead a Community patent's being prosecuted and granted in English without further translations.³⁷ In a recent statement, however, UNICE ceded some ground, stating that the "Commission's proposal, even though not fully in line with UNICE's position, will provide considerable reduction in translation costs compared with the existing system."³⁸ In support, UNICE suggests that language concessions are such a crucial element for some that tampering with them would jeopardize the greater good of adopting an instrument that is both cost-effective and can be used by SMEs.³⁹ Still, it seems there must be other solutions to putting the single language proposition out to pasture, ones that require less expense, but are also acceptable to SMEs.

III. THE COMMUNITY PATENT IN A SINGLE LANGUAGE

A. The Abbreviated Abstract Proposal

In adopting the Community patent, the EU should take a Henry Ford approach to translations—"People can have the Model T in any colour—so long as it's black."⁴⁰ Likewise, applicants may file a patent in any language, provided it is filed together with an English translation.⁴¹ Solutions that would constitute exceptions to the unitary character of the new Community patent should be rejected.⁴² The requirement for translations, all translations, should be abandoned. As the current translation requirements demonstrate, Europe has always been amenable to compromise. Clearly some feel the need to translate something, lest this proposal be rejected outright. To keep costs to a bare minimum, why not select for translation something for its brevity that will still convey the general theme of the patent? As a candidate, consider the proposition of translating solely the abstract, or a portion thereof if it exceeds two or three sentences in length. This could be done in an office staffed by employees of the various

37. *Position Paper*, *supra* note 25, at 7.

38. UNICE, PROPOSAL FOR A REGULATION CREATING A COMMUNITY PATENT (Jan. 9, 2001), at [http://www.unice.org/unice/docum.nsf/AllDocumentsSearchEng/6DAE4A03FF7B1F62C12569D000364327/\\$File/Patent-Gen.pdf](http://www.unice.org/unice/docum.nsf/AllDocumentsSearchEng/6DAE4A03FF7B1F62C12569D000364327/$File/Patent-Gen.pdf) [hereinafter PATENT REGULATION].

39. *Id.*

40. *Famous Quote by Henry Ford*, FAMOUS QUOTES, at http://www.famousquotes.org.uk/ford_henry/4.htm (last visited Apr. 29, 2002).

41. *Position Paper*, *supra* note 25, at 10.

42. *Id.* at 9.

national patent offices. Their task would be to translate the key words of abstracts into their vernacular.⁴³ Although UNICE calculates that this sort of enhanced abstract translation would cost approximately \$175 per translation, the cost could be deferred or subsidized by renewal fees, thereby creating a political compromise in the patent system that is both user-friendly and cost efficient.⁴⁴

B. Notice to the Inventor

Notice is a major concern for many SMEs. How can a third party become aware of a patent's scope if he cannot understand the definitions of its claims?⁴⁵ In patent law, inventors are required to stay abreast with the state of the art.⁴⁶ In so doing, they consult various trade magazines, the European Patent Bulletin, and on-line databases.⁴⁷ The proposal to translate only these Spartan abstracts into all official languages will facilitate the creation of an easily searchable on-line patent database maintained by the EPO. All an inventor need do is select his industry and a few key words relating to his specific work. Using this system, an inventor would be able to search, in his native tongue, for relevant art, and the database would return all relevant abstracts. Only an Internet connection and a computer would be required. As a result, this database would satisfy the informational needs of the public, especially SMEs. With patents though, natural justice demands that a person, subject to the force of the monopoly that a patent confers, should be able to comprehend its scope,⁴⁸ and therefore the entire patent must be disclosed.⁴⁹ Unless one is versed in the interpretation of patent claims, it would be almost impossible to discern what the application specifically relates to without the help of the specification translated into one's native language.⁵⁰ Certainly, a line must be drawn somewhere,⁵¹ but how

43. This system could help alleviate the fears of job loss in the national patent offices by reassigning people to this department. See Hugh Laddie, *National I.P. Rights: A Moribund Anachronism in a Federal Europe?*, 23 EUR. INTELL. PROP. REV. 402, 407 (2001).

44. See *Position Paper*, *supra* note 25, at 12 and n.1.

45. See Heinonen, *supra* note 22, at 2.

46. See EPC, *supra* note 2, arts. 54, 56, 158(1), rule 27(1)(b).

47. See *id.* art. 158(1).

48. Spaargaren, *supra* note 22, at 290. See Lees, *supra* note 15, at 594-95.

49. Heinonen, *supra* note 22, at 220.

50. See *id.*

51. "[When one] comes from a nation of 10 million people, in order to survive [in the world economy] one must take up the languages of others. The truth is no one uses Greek outside of Greece." Interview with Christos Dimopoulos, President's Office, European Patent

can an inventor understand the scope of another's patent without such a translation?

C. *The Author's Translation Proposal*

Let the author offer a simple solution to the problem of translations. If an inventor, in an attempt to keep abreast of the current skill in the art, comes across an abstract in his native language that seems to be relevant to his particular art, he should do what an inventor would normally do in this situation: get the opinion of competent patent counsel. As the patent attorney will most probably be versed in English,⁵² he can read the full patent and render an opinion as to its relevance. If inventors are not already seeking legal advice in regards to their patents, this system should reinforce the importance of doing so. The increase in legal certainty fostered by these opinions may act as strong protective measures and could ultimately reduce the need for litigation.⁵³

D. *The "Unknowing Infringer" Defense*

If a Community patent is accepted and implemented only in English, is a defense of unknowingly infringing the patent acceptable for non-English-speaking infringers?⁵⁴ In these cases, the usual

Office in Munich, Germany (when asked, on a tour of the EPO, about his wide range of language skills) (June 15, 2000) (alteration added).

52. See *Franklin Pierce*, *supra* note 12, at 376. See also *Position Paper*, *supra* note 25, at 8.

53. In any field, the value and trustworthiness of advice depends on the ability of the advisor. A patent specification is a legal and technical document, and drafting one calls for considerable skill and experience. Patent agents and attorneys are members of an elite profession specially trained and experienced in the art of drafting patents. For example, in the UK, all persons on the Register of Patent Agents have spent several years training and have passed through two sets of rigorous examinations to ensure that they are competent to handle patent applications. Is this not the reason patent law is such an exclusive field in Europe and throughout the world, because most people have neither the desire nor patience to go through the years of schooling required to pen and understand these documents? See generally *The Chartered Institute of Patent Agents*, at <http://www.cipa.org.uk/> (last visited Mar. 25, 2002) (summarizing what it takes to be a patent attorney in the UK); EPC, *supra* note 2, arts. 133–34 (outlining the general principles of representation and professional representation before the EPO). See also Karl Bruchhausen, *Determining Patent Subject-Matter in Grant, Infringement and Revocation Proceedings*, 20 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 341 (1989) (providing an excellent discussion on the topic of determining the subject-matter of the patent in revocation and infringement proceedings and the extent of protection conferred in German Patent Court Proceedings).

54. Opinion of the Economic and Social Committee on the "Proposal for a Council Regulation on the Community Patent" 2001 O.J. (C 155) 80, ¶ 6.2.6. (discussing implications of the language rules for enforcement processes).

presumption that ignorance is no excuse should apply. Yet the European Commission has proposed, "a suspected infringer who has been unable to consult the text of the patent in the official language of the Member State in which he is domiciled, is presumed, until proven otherwise, *not* to have knowingly infringed the patent."⁵⁵ This proposal, as now written, will encourage potential infringers to neglect what should be a duty of due diligence and care in favor of feigning ignorance.⁵⁶ Such a defense should not be accepted. The same principles should apply here as above: get competent legal advice. As English is currently the main working language of the EPO,⁵⁷ the inventor's patent counsel will be familiar with English and can properly explain the patent claims.

Still, the problems a single language may pose are numerous. For example, this would lead to a head start for those whose language is chosen.⁵⁸ Why should anyone other than the person attempting to gain an exclusive right over the invention be required to bear the translation cost?⁵⁹ As discussed above, these arguments will be unnecessary if inventors are dealing with their patent counsels. In sum, the system would save millions of dollars in translation costs by eliminating documents no one will ever read.⁶⁰ The practicality of a unitary language for the Community patent seems too great to ignore, but there are other reasons for implementing the Community patent.

IV. OBSTRUCTIONS TO A SINGLE MARKET⁶¹

A. *Patenting Only in Large Markets*

One of the toughest choices facing an inventor when planning to obtain patent protection concerns the territorial scope of the patent; in how many member states should he or she attempt to obtain

55. *Id.* ¶ 6.2.6.2. (emphasis added).

56. *Id.* ¶ 6.2.6.5.

57. Opinion of the Economic and Social Committee on the "Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions—Towards a European Research Area," 2000 O.J. (C 204) 70. ¶ 5.4.2.

58. Jan J. Brinkhof, *Patent Litigation in Europe: Two Sides of the Picture*, 9 FED. CIR. B.J. 467, 471 (2000).

59. Heinonen, *supra* note 22.

60. *Franklin Pierce*, *supra* note 12, at 376.

61. See Gretchen Ann Bender, *Clash of the Titans: The Territoriality of Patent Law vs. the European Union*, 40 IDEA 49 (2000).

protection?⁶² The cost of translating patents is so high that many applicants are forced to be selective in filing translations and to forgo patent protection in some Member States.⁶³ This problem with the European patent must be avoided when the Community patent comes into effect, as it constitutes an obstruction to the single market. An example may be helpful. As the EU grows in member states, there will be a tendency to bet on the “big guy,” i.e., to only make patent translations in the languages of the largest countries. Most patentees, though, cannot afford the cost of a fifteen-country Community patent requiring ten translations. This translation dilemma will only worsen as more member-states with new languages are admitted.⁶⁴ The lack of financial ability among SMEs hinders technological advances in the EU, as there seems to be less incentive to innovate if applicants cannot obtain a monopoly for disclosing their inventions. In terms of patenting costs, European innovators are at a disadvantage when compared to U.S. or Japanese companies in their own markets.⁶⁵

Applicants applying in only the largest markets impede the transfer of technology to the less populous member states.⁶⁶ This same principle will discourage technology transfers in the form of trans-European research and development collaborations as well.⁶⁷ The high cost of translations also harms the smaller member states by making them less attractive to investors, further hindering technology transfer.⁶⁸ The hallmark of the European system was supposed to be the virtual elimination of national boundaries for the purpose of trade. In a single market—where goods, labor, and information are to travel freely throughout the community—the potential that a patent may not cover the whole of this community seems counterintuitive. Absent a true pan-European patent and unless applicants are forced to designate all member states in a European patent, even if they do not want them, the obstructions to a single market will remain.⁶⁹

62. See Case C-44/98, BASF AG v. Präsident des Deutschen Patentamts, 1999 E.C.R. I-6269 (1999).

63. *Id.* ¶ 12.

64. *Position Paper*, *supra* note 25, at 8.

65. PATENT REGULATION, *supra* note 38.

66. See *id.*

67. UNICE, STIMULATING CREATIVITY AND INNOVATION IN EUROPE: THE UNICE BENCHMARKING REPORT 2000 29 [hereinafter BENCHMARKING REPORT], available at [http://www.unice.org/unice/docum.nsf/all+by+description/35E8D63071BCD394C12568EA002FECB0/\\$File/Innov-5.pdf](http://www.unice.org/unice/docum.nsf/all+by+description/35E8D63071BCD394C12568EA002FECB0/$File/Innov-5.pdf).

68. *Intellectual Property: Problems Over Patents*, BUS. EUROPE, Oct. 18, 2000.

69. See Laddie, *supra* note 43, at 406.

B. Obstruction in Action

An example of this principle in action is *BASF AG v. Präsident des Deutschen Patentamts*.⁷⁰ In this case, a European patent belonging to BASF was declared void *ab initio*⁷¹ in Germany on the ground that its proprietor had not filed a German translation of the patent specification. BASF argued that declaration was contrary to the principle of free movement of goods and would result in the division of the internal market.⁷² Noting that there will obviously be differences in the movements of goods depending on whether inventions are protected in all EU member states or only a few,⁷³ the court found that, under the circumstances, such a division of the market could not be considered an obstacle, because those repercussions are "too uncertain and too indirect."⁷⁴ From a common market standpoint, it is hard to reconcile the message of this case: we want a common market, but we are unwilling to eliminate the substantial barriers standing in our way. As a result, this case manifests support for the establishment of a Community patent. By eliminating the high cost of translations or doing away with them all together, corporations would no longer be in the awkward position of selecting a few key member states for their product. Furthermore, businesses would not need to concern themselves with obstructions to the free movement of goods, as a Community patent would be enforceable over the single market.

70. See Case C-44/98, *BASF AG v. Präsident des Deutschen Patentamts*, 1999 E.C.R. I-6269 (1999).

71. EPC, *supra* note 2, arts. 65(1), (3). Article 65 of the EPC provides that:

[A]ny Contracting State may prescribe that if the text, in which the European Patent Office intends to grant a European patent or maintain a European patent as amended for that State, is not drawn up in one of its official languages, the applicant for or proprietor of the patent shall supply to its central industrial property office a translation of this text in one of its official languages at his option or, where that State has prescribed the use of one specific official language, in that language.

Id. If this provision is not followed, the Contracting States are allowed to prescribe that a European patent shall be deemed to be void *ab initio* in the State in question. *Id.*

72. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Oct. 2, 1997, 1997 O.J. (C 340) 173, art. 28 [hereinafter EC TREATY], available at http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf. Article 28 of the EC TREATY states: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." *Id.*

73. *Rule on translation of European patents not incompatible with free movement of goods principle*, 22 EUR. INTELL. PROP. REV. N-48 (2000) (synopsis of Società Italiana Brevetti newsletter, Dec. 1999 (Milan)).

74. *BASF*, 1999 E.C.R. I-6269, ¶ 21.

With decisions like *BASF* fresh in their minds, there is evidence that some European companies are filing first in the U.S. and then using procedures, such as Patent Cooperation Treaty ("PCT") applications,⁷⁵ to piggyback off that U.S. patent into Europe.⁷⁶ The use of a PCT application allows a company to defer costs related to patenting and possibly test the product in a foreign market before applying in Europe.⁷⁷ To avoid this trend, a Community patent must have the objective of being cost effective, especially for use by SMEs.

Another factor to consider is the weakness of the Euro (another area in which the EU has failed to speak with a unified voice),⁷⁸ which one can at least partially blame on the lack of action in devising a unitary title covering the EU.⁷⁹ In reality, it is the slow pace of change that is damaging European competitiveness. Europe has a quasi-unified currency, and, likewise, a quasi-unified patent system. If one could only eliminate the bureaucratic wrangling standing in the way of innovation,⁸⁰ Europe could resume living *la dolce vita*. If Europe is truly to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion,⁸¹ Europe needs a Community patent. The enduring, lamenting voice that the Community patent has no chance because the language problem will allow Europe to remain in its present-day situation, lagging behind the U.S. and Japan in terms of innovations.⁸² To avoid this stagnation, all member states must agree there will be no translations of patent documents if they are submitted in English.⁸³

75. Bender, *supra* note 61, at 56.

76. Eaglesham, *supra* note 5.

77. See Bender, *supra* note 61, at 56.

78. Denmark, Sweden, and the UK have not joined in adopting the Euro. See EUROPEAN UNION, PARTICIPATING MEMBER STATES, at <http://europa.eu.int/euro/html/rubrique-cadre5.html?pag=rubrique-participating5.html&lang=5&rubrique=218&chap=11> (last visited Apr. 10, 2002).

79. On a lighter note, for American or Japanese inventors, there is always the prospect that the Euro will drop so low as to equal 5€ for every \$1, thus making the cost equal to that of a U.S. patent.

80. See PATENT REGULATION, *supra* note 38.

81. Announcement made during the Lisbon Summit of 2001 regarding the new direction to be taken by the Portuguese Presidency of the European Union. See Álvaro de Vasconcelos, *Portugal 2000: The European Way, Research and Policy paper No. 9*, ETUDES ET RECHERCHES (Groupement D'Etudes Et De Recherches Notre Eur., Paris, Fr.), Mar. 2000, at 14, available at <http://www.notre-europe.asso.fr/fichiers/Etud9-en.pdf>.

82. BENCHMARKING REPORT, *supra* note 67, at 29.

83. See Franklin Pierce, *supra* note 12, at 376.

This brings us to the way in which infringement cases are handled in Europe.

V. THE NEED FOR A UNIFIED INTELLECTUAL PROPERTY COURT

Let us begin with the inadequacy of the current legal set-up.⁸⁴ Imagine trying to decide on a restaurant with a group of eleven people. It often turns out that four wish to have Chinese, five want Thai, and two crave Mexican. Who will drive, and how many cars will be used? The point is that it is difficult to speak with a unified voice. The situation is the same when it comes to patent litigation in Europe; the rules for settling patent disputes in Europe are fairly complicated.⁸⁵ Unlike in the U.S., where all patent litigation matters are handled by the federal court system, the various European national courts decide disputes concerning the infringement and validity of patents granted by the Boards of the EPO.⁸⁶ No formal link, let alone any hierarchy, exists between the Boards of the EPO and the national courts.⁸⁷ As a result, there is a lack of uniformity in infringement cases.⁸⁸ A corporation seeking to protect its patent rights against infringements must bring its cases before the national court in each country designated in the European patent. Doing so results in high legal costs and risks contradictory interpretations of the patent by the national courts.⁸⁹ There is no legal framework for infringement and invalidity matters in Europe,⁹⁰ only national procedures. Not only does procedure differ from country to country, but also it can vary within a country from jurisdiction to jurisdiction.⁹¹ These differences are often unintentional or established for reasons that are no longer relevant or long forgotten.⁹² The lack of a uniform

84. See *Position Paper*, *supra* note 25. See also Jan J. Brinkhof, *The Desirability, Necessity and Feasibility of Co-Operation Between Courts in the Field of European Patent Law*, 19 EUR. INTELL. PROP. REV., 226, 229 (1997); Robin Jacob, *The Enlarged Board of Appeal of the EPO: A Proposal*, 19 EUR. INTELL. PROP. REV. 224, 224-25 (1997); John Lambert, *I.P. Litigation After Woolf*, 21 EUR. INTELL. PROP. REV. 427 (1999); Robin Whaite, *Patents—Infringement and Validity—Practical Problems Created By Concurrent Jurisdictions of EPO and National Courts*, 20 EUR. INTELL. PROP. REV. N-170 (1998).

85. Brinkhof, *supra* note 84, at 226.

86. *Id.*

87. *Id.*

88. See Nicolas Groombridge & Christopher Loh, *Europe to See International Patent Court?*, N.Y.L.J., May 7, 2001 at S4, S11.

89. See *id.*

90. Annika Ryberg, *Procedural Law for Patent Litigation*, 29 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 904, 906 (1997).

91. See Lambert, *supra* note 84.

92. *Id.*

system leads to expensive, slow, and complex litigation. This system, governed both by national jurisdiction and international agreements, leads to a host of problems for companies seeking patents in Europe.⁹³

In addition, the European business community views the legal uncertainty generated by the lack of an integrated patent system as a hurdle standing in the way of innovation in Europe.⁹⁴ There is a danger that respect for the patent system in Europe will diminish because the enforcement system and procedural rules are not sufficient, especially from a foreign vantage point.⁹⁵

As the EPO is not an EU institution, infringement suits are adjudicated by national courts.⁹⁶ The national courts of the member states have jurisdiction over disputes concerning infringement and invalidity for the patents designated in their respective states. This results in a risk that judgments by competent courts in different designated states may be contradictory and, therefore, may lead to legal uncertainty.⁹⁷ When coupled with the fact that there is no unified litigation procedure for these infringement proceedings, it places Europe in a curious position.⁹⁸

With the recent addition of Turkey to the EPO, the worst-case infringement litigation scenario for a European patent designating all member states would involve a separate suit's being brought in each of the twenty countries. Each action would follow the national litigation procedures of each member state. Imagine the complexity of twenty different legal proceedings with different procedural rules in every member state.⁹⁹ Since the outcome can be different in each of the member states, an inventor may face the harsh reality of litigating twenty suits, finding success in three, and having a patent held invalid in the other seventeen nations.¹⁰⁰ Thus, enforcing a patent across Europe can involve a terrific waste of money and

93. *Problems Over Patents*, *supra* note 68, at 1.

94. PATENT REGULATION, *supra* note 38, at 1.

95. Ryberg, *supra* note 90, at 907.

96. Bender, *supra* note 61, at 58.

97. Felix Addor & Stefan Luginbuehl, *The First Steps Towards an Optional Protocol Under the European Patent Convention on the Settlement of Litigation Concerning European Patents*, 22 EUR. INTELL. PROP. REV. S1, S2 (2000); Dieter Brändle, *Can and May Interpretation of the Extent of Protection of a European Patent in Different Countries Lead to Different Results?*, 30 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 875 (1999).

98. Ryberg, *supra* note 90, at 906. See Addor & Luginbuehl, *supra* note 97, at S1-3. Several proposals have been put forth for the creation of a unified European Litigation Protocol.

99. Eaglesham, *supra* note 5.

100. See Brändle, *supra* note 97.

resources. Although this may send litigators to the Elysian Fields¹⁰¹ dreaming of fees that would make Croesus¹⁰² blush, it is unlikely that they would be able to participate in more than a handful of suits, because of the differing language requirements in each nation.

SMEs should strongly support a single system of patent enforcement, especially once they realize what this multinational litigation can do to their corporate treasuries. SMEs can find themselves in the situation where, after scoring a few litigation victories, they simply do not have the funds to continue with the war. Thus, they lose out on patent coverage over part of the continent. Furthermore, there is the possibility of being sued in multiple locations. In such a case, they will have no choice but to settle or cease operations. Those same SMEs for whom the language war is being fought¹⁰³ seem to be the ones who would benefit most from a unified litigation system.¹⁰⁴

To address the problem of multiple suits, the EC has sought out the advice of experienced patent judges: the people who know the system and its faults and have suggestions for improvements. In the opinion of the prominent Judge Brinkhof,¹⁰⁵ "it would be wholly inappropriate for European patent holders to institute infringement proceedings in each country. The big question is how does one solve this? . . . [T]here is no other way than to have a European court decide on the issue."¹⁰⁶

This will require the member states to make some extremely difficult political decisions. Recall that any vote to implement a European court of first instance for patent matters requires unanimous support of the member states,¹⁰⁷ and after almost three decades, little

101. Elysium was the abode of the blessed after death in classical mythology.

102. Croesus was the king of Lydia (present day Turkey), circa 560–546 B.C.E., famed for his wealth.

103. Germans, Danes, and Austrians oppose this as detrimental to SMEs who could better adjudicate things on the national level. However, this seems indefensible, because the current set-up sees the SMEs most hurt by the multiple litigations.

104. See *Favourable Conditions for Research and Technological Development*, ERA SEMINAR ON A EUROPEAN RESEARCH AREA, at 4–5 (May 3, 2000), available at <http://europa.eu.int/comm/research/area/conditions.pdf>.

105. Jan Brinkhof is Vice President of the Dutch Court of Appeal, The Hague, and deals with all I.P. cases. See Brinkhof, *supra* note 84, at 226.

106. Remco De Ranitz, *Jan Brinkhof in Conversation with Remco De Ranitz*, 21 EUR. INTEL. PROP. REV. 142, 144 (1999).

107. EC TREATY, *supra* note 72, art. 308.

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting

progress has been made. At this point, if a simple majority of the member states can agree on a single court, in the name of progress, the minority should be prepared to adapt to the others.¹⁰⁸

Legal certainty demands that courts take an affirmative position: decide infringement issues with one voice. In the event a unified court system is not created, there must be a high level of cooperation with the single objective of uniting the fragmented court system. National courts must be willing to give serious consideration to the opinions of their foreign colleagues, and to apply an objective approach to their own opinions.¹⁰⁹ The success of this system, though, depends entirely on the willingness of national judges to comply.¹¹⁰ Without this cooperation, there will be phenomenon known as the "race to the bottom,"¹¹¹ where patent courts are only as good as the feeblest member. This system encourages forum shopping of the most cynical kind.¹¹² In this scenario, Europe would start to see litigants bringing suit in member states where the courts are not as experienced in hearing patent cases.¹¹³ A judgment in these member states would carry just as much weight as in a member state with a rich patent history. This scenario has concerned some member states, such as Germany, because their judges have a high degree of technical training, and to those judges it would seem a gross injustice for their decisions to have equal weight as those of judges in a country where few patent cases are heard.¹¹⁴

Judge Dieter Brändle¹¹⁵ has proposed a way to ensure legal certainty when identical application of the law is not required, that is,

unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

Id. (emphasis added).

108. Brinkhof, *supra* note 84, at 229.

109. *Id.* at 228.

110. *Id.*

111. See generally Catherine Barnard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware*, 25 EUR. L. REV. 57 (2000) (demonstrating how competition between jurisdictions in a deregulated internal market lowers standards, inducing market participants to flock to the state with the lowest social standards, thus leading to a race to the bottom); Groombridge & Loh, *supra* note 88.

112. Laddie, *supra* note 69, at 406.

113. See Philip Leith, *Revision of the EPC, The Community Patent Regulation and "European Technical Judges"*, 23 EUR. INTELL. PROP. REV. 250 (2001); *Position Paper*, *supra* note 25, at 9.

114. See Leith, *supra* note 113, at 252, 253–54; Proposal for a Council Regulation on the Community Patent, *supra* note 27, § 2.4.5.1. ¶ 6.

115. Dieter Brändle holds a Ph. D. and is a Judge of the Commercial Court in Zürich, Switzerland. See Brändle, *supra* note 97, at 875.

when cases are decided by national courts.¹¹⁶ Judges called upon to decide on infringements in foreign countries must not only take into account relevant judgments pronounced in the country in question, but also they must "consider them *decisive* for their own rulings."¹¹⁷ This is the only way to let parties know in advance against what law, or conception of the law, their acts will be measured in a potential lawsuit.¹¹⁸ However, it seems this sort of an honor system is only possible if *every* judge follows this procedure for determining acts of infringement on all judgments on a particular matter, even those pronounced abroad. That is quite a tall order.

One of the preeminent patent court judges of England, Sir Robin Jacob, put forth another solution, which may prevent this type of forum shopping.¹¹⁹ Disputes over patentability can arise before and after grant. The Examining division of the EPO handles the pre-grant disputes while post-grant disputes are taken up with the Opposition Division. Sir Robin has bravely suggested that the way in which to increase the convergence of the approaches of patent law throughout Europe is to appoint national judges, learned in patent law, to the Enlarged Board of Appeals ("EBA").¹²⁰ The EBA acts when either the Examining Division (pre-grant) or the Opposition Division (post-grant) concludes that the application for the patent should be refused.¹²¹ The EBA can also hear an appeal where the Opposition Division has declined to hear an opposition by an applicant for revocation.¹²²

The basic principal underlying Sir Robin's proposal is to use a panel on which the judges are known to have very high judicial standings in their own countries. This, he suggests, should ameliorate some of the stalemate between member states, as parties are sooner to accept a decision where they feel their national interests have been protected.¹²³

Nevertheless, even Sir Robin's proposal makes frightfully apparent the problems of technology transfer affecting smaller member states as mentioned above. He states that many member

116. *Id.*

117. *Id.* at 879.

118. *Id.*

119. *See Jacob, supra* note 84.

120. *See id.*

121. *Id.*

122. *Id.*

123. *Id.* at 225.

states do not have competent patent judges,¹²⁴ and if the trend towards patenting only in the large member states continues, these judges will never obtain the desired level of expertise. A judge must have experience to sit on the panel, but how does this judge obtain the necessary experience when the panel is reluctant to let him sit without it? It is this sort of undesirable situation that small member states wish to avoid.

Although it has the advantage of simplicity—no treaties need be ratified for its implementation—Sir Robin's proposal, with respect to the Community patent, has a limited scope and will have retreated short of its ultimate goal.¹²⁵ A great disadvantage is that the EBA seldom convenes and does not decide matters of infringement; as such, Sir Robin's quest for what seems to be the Holy Grail has been thwarted.¹²⁶

A. *Parallel Proceedings in National Courts and the EPO*

At least in substance, Europe has the same patent laws, as most patents are granted by the EPO.¹²⁷ Although there are provisions in the Brussels Convention¹²⁸ to ensure that only one of the national courts deals with the interrelated actions for infringement,¹²⁹ it is still undesirable to have proceedings concerning a patent resolved in a national court while at the same time corresponding European proceedings are still pending in the EPO.¹³⁰ In the words of English Patents Court Justice Hugh Laddie, "[any later] finding in the EPO would of course be supreme and . . . the defendant would be released belatedly from the effect of injunctive relief which had been granted

124. See *id.* at 224–25.

125. Willems, *supra* note 13, at 8.

126. *Id.* at 9. Thus, the guidance from an EBA staffed as such would be minimal, but if nothing else, it is a step in the right direction. See *id.*

127. Laddie, *supra* note 43, at 406.

128. See Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 29 I.L.M. 1417, 1418 (commonly known as the Brussels Convention); Dieter Stauder, *Cross-Border Protection of European Patents, Part One: A Stocktaking*, 29 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 497 (1998); Peter von Rospat, *Cross-Border Protection of European Patents, Part Two: Decisions of German Courts in Patent Infringement Cases with Cross-Border Effect*, 29 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 504 (1998); Maximilian von Rospat, *Cross-Border Protection of European Patents, Part Three: Discussion*, 29 INT'L REV. OF INDUS. PROP. & COPYRIGHT LAW 509 (1998).

129. See generally Bender, *supra* note 61, at 67–81 (discussing the authority of national courts under the Brussels Convention to decide cross-border patent disputes).

130. Robert Fodde, *Law Report: Undesirable to Have Parallel Proceedings in National Court and European Patent Office*, IRISH TIMES, Apr. 9, 2001, at 20.

against him [in England].”¹³¹ Likewise, in the High Court of Ireland, Mr. Justice McCracken weighed “the costs of duplication and the undesirability of conflicting decisions” and granted a stay in an Irish case pending the decision of the EPO in the same dispute, because to continue proceedings in parallel would have been a “considerable waste of time and money.”¹³² Even if one court can be persuaded to determine infringement for all countries, at least for the time being matters of validity must be considered on a state-by-state basis.¹³³

Therefore, when the Community patent comes into effect, this truly European right needs to be handled by a truly European court, which would follow the same rules throughout the community, as opposed to being handled by a national court, whose rulings would affect the patentee’s rights throughout Europe. If litigation matters are not handled by one court, flaws like those in the 1975 agreement for the Community patent, in which validity and infringement are judged separately, with the possibility that claim interpretation may be different, will overrun the system.¹³⁴ The EPO would be inundated with cases, as only they could decide matters of validity, and most cases would involve counterclaims or stays, only adding to the chaos.

Would simply standardizing the rules for European patent litigation be enough? Based on the limitations mentioned by Judges Brinkhof and Brändle, and the incompleteness of Sir Robin’s proposal, it seems not. Although there appears to be intent on the part of the EPC to “strengthen cooperation between the states in Europe in respect of the protection of inventions,”¹³⁵ this cooperation will not be enough to bring about a truly consistent procedure that a genuine European right deserves.

B. Under the EPC Treaty No Cooperation is Required

Obviously, cooperation is crucial. Under the EPC, however, no cooperation is required.¹³⁶ Once a European patent is issued, it becomes the equivalent of a national patent and is adjudicated in the same manner. It would seem that in this case there is no need for cooperation, because after the grant the EPC ceases to apply to the

131. *Unilever plc v. Frisa N.V.*, [2000] F.S.R. 708, 713 (Eng. Pat. Ct.).

132. Fodde, *supra* note 130.

133. EPC, *supra* note 2, art. 64(3). See Laddie, *supra* note 69, at 406; Rospatt, *supra* note 128, at 509.

134. *Position Paper*, *supra* note 25, at 9.

135. EPC, *supra* note 2, pmb1.

136. Brinkhof, *supra* note 84.

patent and the patent falls under the jurisdiction of the national courts. Article 2 of the EPC states: "The European patent shall, in each of the contracting states for which it is granted, have the effect of and be subject to the same conditions as a national patent granted by the State, unless otherwise provided in this convention."¹³⁷ This would lead the reader to believe that after grant there is *no* distinction between a European patent and the corresponding national patent. In addition, article 64(3) of the EPC¹³⁸ states that "any infringement of a European patent shall be dealt with by national law." Thus, it would seem that, if a European patent is the functional equivalent of a national patent after grant, it should be litigated in the same manner as a national patent. Compare this with a Community patent's having effect over the entire EU. The logical conclusion requires a court that adjudicates such matters cover the same territory. The only true solution to this litigation nightmare is to create a new chamber in the European Court of Justice, specifically for dealing with Intellectual Property issues.

C. Current Proposals for the European Court

One current proposal suggests European regional courts of first instance (creating a "local presence" much like the U.S. system) followed by a European Court of Appeals consisting of judges from several different regions.¹³⁹ This proposal has the advantage of applying uniform procedural law in the court of first instance, and the "local presence" would eliminate the need to travel across Europe for trial. A second proposal favors a European court only for issues of second instance, but prefers that courts of first instance remain at the national level when dealing with validity and infringement issues.¹⁴⁰

Of these two proposals, the former, for a court of the first and second instances, would be preferable, as it would have the possibility of reducing forum shopping because of a uniform procedural law in the court of first instance.¹⁴¹ The latter, by leaving courts at the national level, would have procedural law differing from state-to-state, continuing the tradition of inconsistency. In any case, the current system needs a radical alteration, and at this point politicians

137. EPC, *supra* note 2, art. 2(2).

138. *Id.* art. 64(3).

139. Groombridge & Loh, *supra* note 88, at S-11; Addor & Luginbuehl, *supra* note 97, at S-4 to S-6.

140. See Addor & Luginbuehl, *supra* note 97, at S-6.

141. See *Position Paper*, *supra* note 25, at 9; Ryberg, *supra* note 90, at 907.

are only proposing a cautious modernization of the European patent system. Yet again, the voice of reason in Europe has also been the loudest critic.

UNICE has been particularly sensitive to the need to create a specialized jurisdiction to deal with intellectual property issues. UNICE stresses that only an integrated Community court at the first and second instances, comprising judges experienced in the law of patent infringements and validity, can guarantee legal certainty, by providing unity of law, procedure, and case law, while cutting down litigation costs.¹⁴² The flaw is that if validity and infringement are judged separately, the interpretation of the claims may well be different. UNICE has stated that it is essential for there to be EU-wide jurisdiction. "Infringement actions under a Community patent are too important to be left to courts without the necessary expertise in patent litigation, which applies different standards and where the procedure is inefficient and the costs unreasonable."¹⁴³ In reality, the only way to accomplish this is to create a new Community Patent Court to handle these issues to the satisfaction of the users.

Naturally, if there is only one court for the litigation of Community patents, only one language should be used during litigation.¹⁴⁴ A single language would be very practical, but is it practicable? Based on the same arguments as those previously discussed for a single language in the patent document, there seems to be no reason why it would not work. Even if the patentee were a Finnish monoglot, his patent attorney would be the one making the arguments in court and, as mentioned above, will most probably be versed in English.¹⁴⁵

D. Treaty Modification

The 1975 and 1989 Luxemburg conventions laid the groundwork for the Community patent,¹⁴⁶ but as we have seen, these conventions have not entered into force, and, in their present form, probably never will. The problems facing the European patent system are numerous. The consolidation of legal traditions has been a bureaucratic nightmare. Superfluous translations have had a corrosive effect on

142. PATENT REGULATION, *supra* note 38.

143. *Position Paper*, *supra* note 25, at 9.

144. *Id.* See Brinkhof, *supra* note 58.

145. See *supra* note 25 and accompanying text.

146. See Agreement Relating to Community Patents, *supra* note 8, pmbl.

technology growth across the continent. This emotive issue will continue to be the topic of diplomatic conferences for years to come.

It is not possible to create new courts under the legal arrangements that are covered by the treaty. In order for the proposed Community Patent Court to be established, there must be an amendment to the EC Treaty. To make matters worse, the EC treaty¹⁴⁷ requires that any regulation be approved unanimously for the creation of a Community system of protection.¹⁴⁸ Until all member states can agree, the viability of the Community Patent Court is questionable. Alternatively, if the Community patent comes into existence, what does one do with the European and national patent systems?

VI. THE POSSIBILITY OF THREE CO-EXISTING PATENT SYSTEMS IN EUROPE

With the addition of the Community patent in the near future, there will be three possibilities for patent protection in Europe: the national patent, the European patent and the Community patent.¹⁴⁹ Will there still be a need for the other systems? The EPC and Community patent are not competing patent systems, and the territory of the European patent, in addition to covering the European Community, includes Switzerland, Monaco, Liechtenstein, Cyprus, and Turkey. It has been argued that, as long as there are member states that do not belong to the European Union, there will be a need for the EPO, and the systems will complement each other.¹⁵⁰ There are also a number of other countries expected to become members in due course.¹⁵¹ In fairness to these states, as they are not members of the European Community, it may be beneficial to retain the European patent.

147. See EC TREATY, *supra* note 72, arts. 308, 225(2).

148. See generally Addor & Luginbuehl, *supra* note 97 (proposing a community wide system of litigation).

149. See Willems, *supra* note 13, at 5-6.

150. Addor & Luginbuehl, *supra* note 97, at S-2.

151. *Id.* at S-2 n.5.

The EPO currently has nineteen Member States: all the members of the European Union, plus Cyprus, Liechtenstein, Monaco, Switzerland. Turkey will join in the course of this year. At July 1, 2002, the EPC will also be open for accession to Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, Slovakia, and Slovenia.

Id.

A second motive for keeping the European patent alive would be to appease the few SMEs who refuse to do their patent work in English. Let the *compromise* be that there will still be the option of getting a European patent. Of course, there are arguments that there will be no room for a European patent alongside a Community patent, because the area of overlap is just too large to justify the maintenance of a separate system.¹⁵² This death of the European patent does not also include the demise of the EPO. The knowledge stored on Erhardstrasse¹⁵³ is an Alexandrian library Europe cannot afford to lose. Still, there are those who insist that by maintaining both systems companies will be able to enjoy the desired advantages of the Community patent without losing the proven advantages of the European patent.¹⁵⁴ Yet what possible role could a national patent play?

There may be some value in keeping the national patent in existence, possibly for the needs of SMEs with only a local scope of business, but this is just another case of overkill. The use of national rights, for both the national and European patents, divides the common markets, and as previously discussed, this is one of the pitfalls the Community patent would avoid. There is no reason to tolerate these distortions once patent law has been harmonized.¹⁵⁵ It may turn out that European courts will not continue to allow the division of the common market that patents with only a national effect allow.¹⁵⁶

It is redundant to maintain both the European patent and the Community patent if they cover identical territory with identical criteria. Nonetheless, Europe retains its packrat instinct, unwilling to discard anything in the hope that it will someday serve a useful purpose.¹⁵⁷ If the Community patent is to have the same translation overkill requirements as the European patent, why bother with it at all? To be unitary, simple, and more affordable than the current system, criteria must change. Ongoing disputes about national hubris and fears about job losses in national patent offices only add flames to today's fragmented and irrational system.¹⁵⁸ The existence of a Community patent that is identical in every way to the current

152. Willems, *supra* note 13, at 5.

153. The address of the EPO is Erhardstrasse 27, D-80331 Munich, Germany.

154. *Position Paper*, *supra* note 25, at 9.

155. Willems, *supra* note 13, at 5.

156. *Id.*

157. Laddie, *supra* note 69, at 407.

158. *See id.*

European patent, save for its being one document rather than a bundle, is quite simply unnecessary. So how do the European and national patents ride off into the sunset gracefully?

The transitional course of the Community patent should be like water, always seeking the path of least resistance. As discussed, this path needs to follow one language, and lead to dispute resolution in a single European court. Rather than forcing its way through the logjam of jurisdictional frictions, it should allow the other systems to trickle down and dry up. Consider the proposition of letting Natural Selection sort out Europe's patent evolution—survival of the fittest. By allowing all three systems co-exist for a certain time, the true advantages of the Community patent will be realized, while the pitfalls of the old systems will become glaringly apparent.

It will be interesting to note how many applicants opt to drag their knuckles with the prehistoric European patent when they can hold their Community patent and proudly walk upright. Perhaps a few Mediterranean states will continue to use European and national patents for spite because they never got their language concessions, but realistically, once inventors realize the benefits of a unitary title, the continent will soon forget the European patent.

VII. A ONE-STOP PATENT SHOP

What is the value to consumers of having a system that enables on-line book buyers to make repeat orders with one click of a mouse button? Ease of use? Convenience? Would it not be desirable to apply this convenience to the Community patent, so that one is not only able to apply for that patent in one place, but may also be at ease knowing that this same patent would also be litigated in one European court.¹⁵⁹ This was the idea behind the European patent, an attempt to consolidate (almost) all of an inventor's patent needs.¹⁶⁰ We have seen, however, that it is farcical to think one can truly obtain a European patent with a single click. Enforcement is not covered by the same system and may take as many as twenty clicks; thus, the advantages gained by having a unitary grant are lost soon after when it comes time to litigate. The purpose of patent laws is to encourage invention and innovation by guaranteeing inventors an exclusive right

159. *Position Paper*, *supra* note 25, at 10.

160. The Preamble to the EPC states in relevant part: "The Contracting States . . . [desiring] that such protection may be obtained in those States by a single procedure for the grant of patents and by the establishment of certain standard rules governing patents so granted" EPC, *supra* note 2, pmb1.

to commercial returns, not to bury them in paperwork and bankrupt them with unnecessary fees.

VIII. CONCLUSION

For thousands of years, mankind has made attempts to harmonize its language, and once, long ago, it did have one unified tongue.¹⁶¹ As soon as the people had realized this goal, it was taken away from them, and their unified language was confused into many.¹⁶² Out of this din of confusion, a cry has again risen for one unified voice. This time around the story has taken us to Europe, where 340 million voices cannot agree upon whose language should preside over the realm of patent law.

So why should we learn to stop worrying and love the English language? For one, we in the U.S. have the luxury of a patent system with a unitary language and court system. Second, a Community patent, granted and litigated in a single language, offers the advantage that inventors need only make one application. The management of patent rights would be simplified, duplicative legal actions would be avoided, and legal certainty would be improved. With this in mind, when it comes time to implement the unitary title in a single language, how can Europe not embrace English?

Finally, there is a genuine need for improvement upon the current situation in Europe. The creation of a Community patent that does not embody the basic requirements of being unitary and affordable, providing legal certainty, and being in a single language, should be rejected. If some compromise must be made with regard to translation, let it take shape in the short abstract mentioned above. If no quarter were given regarding translations, it would be better to have no Community patent than to have one with the complexities of the current system. The present European set-up represents compromise. Let the Community patent system represent common sense.

161. It should be noted that the language was not English. See *Genesis* 11:1 ("At first, the people of the whole world had only one language and used the same words").

162. *Genesis* 11:6-7.

And the Lord said, "Indeed the people *are* one and they all have one language, and this is what they begin to do; now nothing they propose will be withheld from them. Come let us go down and there confuse their language, that they may not understand one another's speech."

Id.